WILLARD PEASE OIL AND GAS CO.

IBLA 88-38 Decided March 29, 1989

Appeal from a decision of the Utah State Office, Bureau of Land Management, determining that gas vented from oil and gas lease U-11620 was "avoidably lost" and the volume of such gas.

Set aside and remanded.

1. Oil and Gas Leases: Generally--Oil and Gas Leases: Royalties

> Where BLM issues a decision conclusively presuming that gas flared on a Federal oil and gas lease without prior authorization from BLM was "avoidably lost," and where BLM subsequently issues an instruction memorandum adopting a significant change in the interpretation of BLM policy concerning determinations of whether gas flared from Federal and Indian leases is "avoidably lost" and directing BLM to review all prior determinations of avoidable loss to conform them to the new policy, BLM's decision will be vacated and the case remanded for further review under the terms of the new policy.

APPEARANCES: Thomas W. Bachtell, Esq., and Frederick M. MacDonald, Esq., Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Willard Pease Oil & Gas Company (Pease) has appealed a decision dated July 20, 1987, by the Utah State Office, Bureau of Land Management (BLM), upholding a determination by the Moab, Utah, District Office that 33,958 MCF (thousand cubic feet) of gas was vented without authorization from oil and gas lease U-11620 between January 1985 and January 1987.

Pease operates five wells (Calf Canyon Nos. 1, 7, 8, 10, and 11) on lease U-11620, which covers portions of sec. 3, T. 20 S., R. 21 E., Salt Lake Meridian, in Grand County, Utah. By letter dated January 21, 1987, the Moab District Manager (DM) notified Pease that a product verification inspection had disclosed unapproved venting of natural gas on the lease, contrary to the provisions of Notice to Lessees No. 4-A (NTL-4A)

and 43 CFR 3162.7-1(d). 1/ The DM also stated that Pease had failed to correctly report how the gas had been disposed. Accordingly, he required
it to submit amended monthly reports for the period January 1985 through December 1986, showing total disposition of all gas produced, whether sold, vented, or used on the lease. The DM further instructed Pease to file an application under NTL-4A for approval of venting of gas on the lease. This application was to contain the following information:

> 1. Documentation of individual GOR [gas-oil ratio] rates for each well at completion and the two most recent well tests done on each well.
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> 2. Total volume of gas flared or vented on [the] lease by individual well from date of completion to present on a monthly basis.
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> 3. A plan to capture the gas for beneficial purposes within one year of receipt of this notice or engineering, geologic, and economic data to justify that capturing for beneficial use is not economically feasible.

On March 2, 1987, Pease filed the amended monthly reports, along with its NTL-4A application. In this application, Pease noted that there is no pipeline in the area and argued that, due to the small amount of the gas coming from the wells, there was "no economical marketability" for the gas.

On April 15, 1987, the DM notified Pease that he agreed that the
gas was uneconomical to market. Accordingly, he ruled that flaring was approved, but only effective February 1, 1987. 2/ The DM advised Pease that, since unauthorized flaring had occurred on the lease prior to the approval, that is, from November 1984 to February 1, 1987, Pease might be liable for an assessment of the royalty value of the flared gas during this period. The DM notified Pease that it had used the well test information it had supplied to establish a gas-oil ratio curve to compute the volume of gas

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1/ 43 CFR 3162.7-1(d) provides: "The lessee shall conduct operations in such a manner as to prevent avoidable loss of oil and gas. A lessee shall be liable for oil or gas lost or wasted from a lease site, or allocated to
a lease site, when such loss or waste is due to negligence on the part of the lessee of such lease, or due to the failure of the lessee to comply
with any regulation, order or citation issued pursuant to this part."

NTL-4A, which was published at 44 FR 76600 (Dec. 27, 1979), is a lengthy notice specifically directed to the calculation of royalties or compensation for oil and gas which is lost by an operator. See Lomax Exploration Co., 105 IBLA 1, 6-7 (1988).

2/ The basis for BLM's making the effective date of the approval Feb. 1, 1987, which was prior to the date of the NTL-4A application, is not immediately clear.

vented between January 1985 and January 1987. 3/ BLM's calculations showed a volume for total gas flared without approval of 33,958 MCF. By electing to use the gas-oil ratio curve, BLM disregarded Pease's calculations of the volume of vented gas that were included in its NTL-4A application.

Significantly, BLM's letter of April 15, 1987, tacitly ruled that all gas flared from these leases prior to February 1, 1987, the date on which it granted approval to flaring, was "avoidably lost" within the meaning of NTL-4A and 43 CFR 3162.7-1(d). This determination was important because there is no liability for royalty for gas that is not "avoidably lost" under these provisions.

On May 11, 1987, Pease filed a letter objecting to BLM's failure to notify it earlier of its obligation to request approval under NTL-4A. On June 5, 1987, the DM notified Pease that his final decision was that a total volume of 33,958 MCF of gas was vented from the wells on lease U-11620 prior to approval on February 1, 1987. The DM advised Pease that it would notify the Minerals Management Service (MMS), Division of Royalty Management, Royalty Valuation and Standards Division, for a value determination of the flared gas and a billing, if MMS so desired.

Pease filed a formal appeal to the Utah State Director, as provided in 43 CFR 3165.3, challenging the estimated amount of vented gas from the lease. In its appeal, Pease raised many points, but stressed its objection to the methodology used by BLM to determine the amount of the flared gas, characterizing its volume calculations as "inaccurate estimates of intermittent and inconsequential gas venting." On July 20, 1987, the State Director issued his decision affirming the DM's decision. Pease appealed to this Board.

[1] Although a principal issue presented by Pease's appeal is its disagreement over the correctness of BLM's determination of the volume of gas vented from the wells on this lease, a development in oil and gas operations law has occurred that moots this question.

As noted above, BLM's determination that the gas flared from this lease was avoidably lost is a critical issue here, for if it was not "avoidably lost," lessee bears no responsibility to pay royalty on it. The DM's decision in April 1987 that gas vented between January 1985 and February 1987 was "avoidably lost" was based on a policy then in effect that gas vented prior to BLM's granting approval for the venting would automatically be conclusively deemed to be "avoidably lost." BLM made this determination

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3/ Although BLM noted that gas had been vented from Nov. 1, 1984, its "unavoidable loss" determination dated only from January 1985. The reason for this difference is not immediately clear.

notwithstanding that it did not formally notify Pease that it was required to submit an NTL-4A application until January 1987. 4/

In Ladd Petroleum Corp., 107 IBLA 5 (1989), we noted that, in August 1987, just after BLM's decision in this case, BLM issued Instruction Memorandum (I.M.) No. 87-652 changing its interpretation of NTL-4A. Under this I.M., in some circumstances, a lessee must be given written notice by certified mail and an opportunity to show the gas was not marketable before he can properly be held liable for royalty for flaring gas. Further, under
the new policy announced in the I.M., the gas might not properly be deemed to be "avoidably lost" if the lessee showed, even after the fact, that it was uneconomic to sell the flared gas as of the time that it was flared.
We stated in Ladd:

> On August 17, 1987, * * * the Director of BLM issued [I.M. No. 87-652] concerning BLM's policy for avoidably lost gas on onshore Federal and Indian oil and gas leases. I.M. No. 87-652, which applies to both past and future determinations of avoidably lost gas, requires that, when no application to flare gas has
> been submitted by an operator after the expiration date of the initial authorized test period (30 days or 50 MMcf, whichever occurs first), BLM must notify the operator that it has 60 days
> in which to submit an application to justify its position that it was uneconomic to capture gas both at the time of application and as of the expiration date of the initial authorized test period. Id. at 5.
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> The rationale for allowing an operator to demonstrate later that it was uneconomic to capture the gas from the time that unauthorized venting commenced is stated [in the I.M.] as follows:
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> > [I]f, in fact, it was not economic to do so at that
> > time [the gas was flared], no monetary obligation should attach solely by reason of a failure to have filed a timely application to continue venting or flaring. In most, if not all cases of unauthorized venting or flaring, operators have reported and continue to report monthly the volumes of gas being vented or flared. In many instances, however, no action was taken [by BLM]
> > to compel compliance with applicable requirements until months or even years after the onset of the unautho-rized venting or flaring. Thus, when it would have been uneconomic to capture the gas as of the critical point in time, the balance weighs on the Bureau's failure to

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4/ The record shows that BLM did, on several occasions (meetings on May 16, Oct. 7, and Dec. 5, 1985, as well as telephone reminders on Apr. 25 and May 15, 1986) informally request that Pease submit an NTL-4A application. Although the question of when BLM gave notice to Pease is significant under I.M. No. 87-652, it does not appear that informal notice will suffice, as the I.M. provides for notice by certified mail. However, BLM is free to consider the issue of the adequacy of such notice on remand.

> react timely to the monthly reports, rather than on the operator's failure to seek a timely approval to continue venting or flaring as uneconomic, since no economic loss has been suffered. The balance weighs on the operator's failure, however, when it would have been economic to capture the gas at the critical time.

I.M. No. 87-652 at 8. The I.M. further requires BLM to review all prior determinations of avoidable loss that meet the criteria set out and to take appropriate action to conform those determinations to the guidance set out in the I.M. Id. at 6.

Although these guidelines were not in effect when BLM issued the decision in the instant case, they reflect the present policy of BLM concerning the proper application of NTL-4A and the regulations on which it is based to make determinations of avoidably lost gas. In the past, this Board has applied an amended version of a regulation to a pending matter if to do so would benefit the affected party, and if there were no countervailing public policy reasons or intervening rights. James E. Strong, 45 IBLA 386 (1980). The rationale for such action is equally appropriate here where BLM has indicated a change in its policy regarding the application of NTL-4A concerning avoidably lost gas which would benefit appellants, and there are no countervailing regulations, public policy considerations, or intervening rights. See Somont Oil Co., Inc., 91 IBLA 137 (1986). We note that this case falls squarely within the rationale for the change in policy: Patrick reported the volume of the gas flared each month for over 3 years without BLM taking action to compel compliance with the applicable requirements. Accordingly, we set aside BLM's determination that gas flared from the well prior to October 31, 1984, was avoidably lost, and remand for further consideration of whether it was uneconomic to capture that gas at that time, consistent with the guidelines announced in I.M. No. 87-652.

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> In light of our resolution of this appeal, we find it unnecessary to rule on the other issues raised by appellants. [Emphasis supplied.]

(Ladd at 7-9).

Pease's situation is similar to that presented in Ladd, with the additional issue that the Calf Canyon No. 1 well was completed prior to December 1, 1980, and thus is subject to different treatment under NTL-4A than the other wells, which were completed after this date. As in Ladd, we deem it appropriate to set aside BLM's determination that gas flared from January 1985 to January 1987 was avoidably lost and remand the matter to BLM for further consideration of whether the gas from the wells on Pease's lease was "avoidably lost" under NTL-4A, as interpreted by I.M. No. 87-652.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the matter is remanded to BLM for further action as described herein.

David L. Hughes
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge